88-942 (1)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1988

LABOURE ASSOCIATES PERSONNEL SERVICES, INC.

Appellant

V.

KATHRYN J. WHITMIRE, ET. AL.

Appellees

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1.

## QUESTIONS PRESENTED FOR REVIEW

(1) When Appellant-LaBoure has demonstrated differential treatment by Appellees through comparative performance, statistics and disparate amendments, has there been a prima facie case of racial discrimination presented under 42 U.S.C. Section 1981 and 42 U.S.C. Section 1983 by Appellant-LaBoure?

(2) Did the Federal District Court and the United States Court of Appeals, Fifth Circuit, commit reversible and fundamental error in their disregard and lack of evaluation of the statistical evidence in determining whether Appellant-LaBoure had been discriminated against under the disparate impact theory?

(3) Did Appellee-HJTPC have a "legitimate business reason" for terminating Appellant-LaBoure and was there sufficient proof presented that indicated Appellee-HJTPC used business necessity rather than just "any reason" for the termination of Appellant-LaBoure?

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LABOURE ASSOCIATES PERSONNEL SERVICES, INC.

Appellant

V.

KATHRYN J. WHITMIRE, ET. AL.

Appellees

_____

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

_____

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Wayman L. Prince respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit filed August 3, 1988.

II

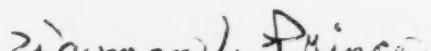
## CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for appellant, Wayman L. Prince, certifies that the following list of persons have an interest in outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

| | |
|---|---|
| Wilmer Andrews, Jr. | - President of Appellant |
| Paul Bibler, Jr. | - Senior Assistant City Attorney |
| Gordon B. Bonfield, An Individual, Chairman of HJTPC | - Appellee |
| City of Houston, Texas A Municipality | - Appellee |
| Houston Job Training Partnership Council, (HJTPC), a Corporation | - Appellee |
| Louise A. Howells | - Assistant City Attorney In Charge for Appellee, City of Houston and Appellee, Kathryn J. Whitmire |
| Terry W. Hudson, An Individual, Executive Director of HJTPC | - Appellee |

| | |
|---|---|
| C. Mark Jodon | - Attorney for Appellees: Terry W. Hudson, Gordon B. Bonfield and HJTPC |
| LaBoure Associates Personnel Services Inc., A Corporation | - Appellant |
| Jeffrey C. Londa | - Attorney in charge for Appellees: Terry W. Hudson, Gordon B. Bonfield and HJTPC |
| Laura S. Portwood | - Senior Assistant City Attorney |
| Wayman L.Prince | - Attorney in Charge for Appellant, LaBoure Associates Personnel Services, Inc. |
| Jerry E. Smith | - United States Circuit Judge, Fifth Circuit Court of Appeals (Former City Attorney for City of Houston while case was pending in trial court.) |
| Susan T. Taylor | - Senior Assistant City Attorney |
| Clarence A. West | - City Attorney for City of Houston, Texas |
| Kathryn J. Whitmire, An Individual-Mayor for City of Houston, Texas | - Appellee |

Respectfully Submitted,



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## OPINIONS BELOW

District Court Memorandum Opinion and Final Judgment, dated November 3, 1987, granting Motion to dismiss, is printed at Appendix A, and is not officially reported.

Fifth Circuit Court of Appeals judgment affirming District court's decision, dated August 3, 1988, is printed at Appendix B, and is not officially reported.

Fifth Circuit Court of Appeals judgment denying the Petition for Rehearing, dated September 6, 1988, is printed at Appendix C, and is not officially reported.

## JURISDICTION

The date of the Judgment of the Fifth Circuit Court of Appeals sought to be reviewed is August 3,1988, which is also the date of entry, Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

## STATEMENT OF THE CASE

The Plaintiff, whose subcontract under the Federal Job Training Partnership Act, 29 U.S.C. Sec. 1501-1592 was terminated, filed a lawsuit in Federal District Court on October 22,1986, alleging inter alia, racial discrimination in violation of 42 U.S.C. Sec. 1981 and 42 U.S.C. Sec. 1983, denial of Equal Protection, denial of Due Process, Breach of Contract and Negligence on the part of Defendants: Kathryn J. Whitmire, City of Houston, Gordon B. Bonfield, Terry W. Hudson and the Houston Job Training Partnership Council. The Official Docket Control Order and Docket Call of the Federal District Court, executed by the Federal District Judge, had the case set for trial on short notice, dated November 2, 1987. On November 3, 1987, the Federal District Court entered a Final Judgment with an accompanying memorandum granting the Defendants' Motion to Dismiss. (Appendix A).

Wayman L. Prince was the attorney in charge for the Plaintiff, LaBoure Associates Personnel Services, Inc., and an appeal was filed on November 25,1987 to the Fifth Circuit Court of Appeals. The Plaintiff's Brief was filed with the Fifth Circuit Court of Appeals on January 22, 1988.

On February 26, 1987 the Fifth Circuit Court of Appeals ruled on several pending motions by the Appellees and Appellant: The Court denied Appellees' Motions to Strike the Appellant's Brief; The Court granted Appellees' Motion to Correct Memorandum in Support of Appellee' Motion to strike Appellant's Brief; The Court denied Appellant's Motion for Sanctions; and the Court denied Appellant's Motion to Strike Appellees' Motion for Extension of Time.

An Oral argument was held before a three Judge panel for the Fifth Circuit Court of Appeals on June 9, 1988. Attorney Wayman L. Prince represented the Appellant, Laboure and Attorneys Jeffrey C. Londa and Louise A. Howells represented the Appellees.

The Fifth Circuit Court of Appeals on August 3, 1988, without publication of opinion, affirmed the decision of the Federal District Court (Appendix B):

> "LaBoure has failed to show any breach of contract by HJTPC. In addition, it did not sufficiently support its allegations of discrimination to create a genuine issue of material fact. Since all its claims require one or both of these bases, the District Court properly granted summary judgment. The judgment of the District Court is therefore AFFIRMED."

On August 16, 1988, Attorney Prince was granted an extension of time for filing a Petition for Rehearing. The filing deadline date was August 31, 1988. The Petition for Rehearing was filed on August 25, 1988.

The Fifth Circuit Court of Appeals, without comment, denied the Petition for Rehearing on September 6, 1988, the date of entry. (Appendix C).

## I. WHEN APPELLANT-LABOURE HAS DEMONSTRATED DIFFERENTIAL TREATMENT BY APPELLEES THROUGH COMPARATIVE PERFORMANCE, STATISTICS AND DISPARATE AMENDMENTS, HAS THERE BEEN A PRIMA FACIE CASE OF RACIAL DISCRIMINATION PRESENTED UNDER 42 U.S.C. SECTION 1981 AND 42 U.S.C. SECTION 1983 BY APPELLANT-LABOURE?

LaBoure, a Texas Corporation, by its President, Wilmer Andrews, Jr., a Black male, executed a contract with Appellee, HJTPC, on August 9, 1985 to provide retail sales/cashier employment services in the Houston area. The City of Houston, Appellee, approved the subcontract between HJTPC and LaBoure on July 30, 1985.

Under the Federal Job Training Partnership Act, ("JTPA Program") 29 U.S.C. Sec. 1501-1592, the City of Houston is a Service Delivery Area (SDA) for the JTPA Program, designated by the Governor of the State of Texas, and also pursuant to the Texas Job Training Partnership Act, Tex. Rev. Civ. Stat. Ann. art. 4413 (52). The contract between the City and HJTPC had the City with the continuing monitoring responsibility and evaluation of performance standards for the subcontracts, which included LaBoure. Mayor Whitmire, a White female, appoints members to serve on the Private Industry Council (PIC) which acts as the Board of Directors for HJTPC. Terry W. Hudson, a White male, was the Executive Director of HJTPC and Gordon B. Bonfield, a White male, was the Chairman of HJTPC.

The subcontract of LaBoure was to be for the contract period or program year covering August 1, 1985 through June 30, 1986 (PY 1985), although not executed until August 9, 1985 by Wilmer Andrews, President of LaBoure. LaBoure's subcontract was for a total of $572,500 and in accordance with the JTPA Program there were certain placement requirements. Section 2.4.2 of the Appellant's subcontract provided that the Appellant was to place

225 new participants in full-time employment at the following entry wages:

"45 participants at a minimum hourly wage between $4.50 and $4.99.
113 participants at a minimum hourly wage between $5.00 and $5.49 above."
67 participants at a minimum hourly wage of $5.50 and above."

The subcontract of the Appellant in Section 2.9.4 delineated a successful placement as a participant placed at the minimum hourly wage, stated in provision 2.4.2 (see above), in full-time unsubsidized permanent employment, which is verified after six (6) full-time working days. In addition, the Appellant was paid a fixed unit price of $2,244.44 for each successful placement as set forth in Section 2.7.2 of his subcontract that was derived by taking the total contract award of $572,500 (less $67,500 of On-the-Job Training[OJT] funds which were used to reimburse employers authorized under a third party cost reimbursement basis) or $505,000 divided by 225 placements. A caveat to the fixed unit price was that it was only paid in full to the subcontractor upon completion of training by the participant, placement and thirty (30) days retention on the job by the participant.

Of the thirty-two (32) known subcontractors for Program Year (PY) 1985, the aggregate total of the contract awards was $18,531,004.00. The three (3) Black private subcontractors, including LaBoure, received a total of $1,367,965.00 in contract awards for PY 1985 or approximately seven percent (7%) of the aggregate total of contract awards. Meanwhile, White private subcontractors received $10,556,733.00 of the aggregate total of the contract awards for PY 1985 or approximately 57% of the aggregate total. According to the HJTPC's PY '85 Annual Plan, Blacks comprised 48.1% of the Houston Service Delivery Area's (SDA) program-eligible targeted population. On the other hand, Whites comprised only 23.5% of the targeted population. These statistics not only manifest racially motivated animus by Appellee

HJTPC in the selection of Black subcontractors but also display a failure to properly assure minority firms of a fair share of HJTPC funds as stated in the Federal Job Training Partnership Act governing Federal Procurement Regulations, Attachment O, OMB Circular A-102, at Paragraph 9 establishes, in part, the following standards:

"a. It is national policy to award a fair share of contracts to small and minority firms. Accordingly, affirmative steps must be taken to assure that small and minority businesses are utilized when possible as sources of suppliers, equipment, construction and services....." (emphasis supplied).

Appellant LaBoure in a December 19, 1985 letter to HJTPC Executive Director Terry W. Hudson requested an amendment to its entry level wage rate of $4.50 per hour. In its request to HJTPC, LaBoure used the word "essential" twice to stress that youth should be adequately served and that students should be removed from the welfare and other government-subsidized programs. The Appellant never directly or indirectly asserted ("repudiated") that it could not perform. The Appellant's use of the word "essential" in his December 19, 1985 letter was consistent with the terminology and performance standards espoused in Sections 1.05 and 1.10 of his subcontract:

"Section 1.05 .....SUBCONTRACTOR UNDERSTANDS AND ADMITS THAT THE SUBMITTAL OF THE FORMS AND REPORTS STATED ABOVE IS AN ESSENTIAL TERM OF THIS SUBCONTRACT." (emphasis supplied).

"Section 1.10 ..... That performance as set forth in the subcontract is **essential** to the life of this subcontract." (emphasis supplied).

Upon careful examination of the Appellant's December 19, 1985 letter, there was clearly no discernible repudiation of his subcontract:

"LaBoure Associates Personnel Services, Inc. request that the council favorably consider modifications to HJTPC-17 Contract as

listed below, with the changes to be implemented immediately:.....

2.4.2-To provide placements for a minimum of 225 new participants, in full-time training related unsubsidized employment, paying no less than the following entry wage:

162 Participants at a minimum hourly wage between $ 3.35 and $3.99. (72%)

47 Participants at a minimum hourly wage of $4.00 and $4.49. (21%)

16 Participants at a minimum hourly wage of $4.50 and above. (7%)

JUSTIFICATION: The proposed ratios of minimum entry wages to number of participants reflects current, existing economic conditions and policies within the Houston area retail industry. We have surveyed 12 major, independent retailers representing over 300 retail locations within the Houston service delivery area. The average starting wage for entry level retail clerks and cashiers is $3.75 per hour.....We have encountered no employers who are willing to start our trainees at a higher rate than they are paying their current employees. THIS REQUEST IS ESSENTIAL IF WE ARE TO ADEQUATELY SERVE YOUTH.

A favorable consideration of these requests for modification is essential in meeting our mutual objective of removing our students from welfare and other governmentally-subsidized programs and placing them as self-sufficient participants in the labor force."

As a result, the aforementioned did not repudiate the terms and conditions of Appellant's subcontract with Appellee HJTPC. Nevertheless, subsequently, in a January 15, 1986, letter from Appellee Hudson, LaBoure's subcontract was terminated, effective February 15, 1986, after four month's performance for failure to comply with the terms and conditions of the contract.

According to a January, 1986 HJTPC published Subcontractor Performance Report, LaBoure successfully placed five (5) participants under its original subcontract and had achieved an overall placement rate of 129% with forty-five (45) actual

placements out of planned thirty-five (35) placements for all provisions of its subcontract. Despite this superior performance, LaBoure was the only known subcontractor ever to be terminated by HJTPC. Also, the Appellant was scheduled to enroll (as defined by the enrollment documents submitted to HJTPC in reference to Section 2.9.2 of Appellant's subcontract) 300 participants and had reached his enrollment quota when he was terminated.

In the prior program year (PY 1984), HJTPC allowed three known subcontractors to operate for the entire contract year with zero (0) placements without termination according to HJTPC Performance Schedule PY 85 Subcontractor Performance. Moreover, during PY 1985 (July 1, 1985 through June 30, 1986), three "similar situated" White subcontractors during a four month period, like LaBoure, had either one (1) or zero (0) placements but none were terminated: Management Insights, Inc., who received a $1,573,400 contract award for 1,000 placements and had no amendments or modifications to its subcontract, had zero (0) placements; Training for Retailers,Inc., (TRI) who received a $373,120 contract award for 216 placements with a fixed unit cost of $1,268.00 did have a contract modification, and had one (1) placement; and Southland Corporation, who received a sole source contract award for $262,200 to place 342 participants with a fixed unit cost of $2,200 did have a contract modification, and had one (1) placement.

Although these three White subcontractors performed worse than Appellant during a similar four month period, none of them were terminated notwithstanding the boilerplate performance section in a HJTPC performance-based subcontract, Section 1.10, page six of LaBoure's subcontract (which is identical to all HJTPC performance-based subcontracts), that provides:

"THAT PERFORMANCE AS SET FORTH IN THE SUBCONTRACT IS ESSENTIAL TO THE LIFE OF THIS SUBCONTRACT".

Hence, Appellees-HJTPC and the City did manifest discrimination by terminating LaBoure's subcontract.

The admissibility of the Appellant's evidence is direct evidence of discrimination and an important factor to demonstrate differential treatment as stated in Williams v. DeKalb County, 82 F.R.D. 10 (N.D. Ga. 1979), the factors include:

> "historical background of decision, specific sequence of events leading up to challenged decision, departures from normal procedural sequence, and departures from substantive factors normally considered important."

Likewise, in Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977), Plaintiff met his burden of proof in establishing a prima facie case of racial discrimination when the record demonstrated:

> "(1) That plaintiff was a member of racial minority; (2) that he was qualified for job he was performing as bricklayer; (3) that he was **satisfying normal requirements in his work**; (4) that he was discharged; and (5) that after his discharge employer assigned white employees to perform same work; and instance of racial discrimination was not vitiated by evidence that certain other bricklayers at site were black since reducing number of black employees in favor of white employees was no less unlawful than eliminating all black employees from work force." ( emphasis supplied).

Both the Federal District Court and the Fifth Circuit Court of Appeals erred in not recognizing that LaBoure presented a prima facie case of discrimination through comparative performance, statistics and disparate amendments. One subcontractor, Training for Retailers (TRI), that was in direct competition with the Appellant, expressly stated that it could not perform but yet was given a six month contract extension and recommended by HJTPC for a new contract for the following program year 1986. There were three specific items of correspondence that manifested Appellee HJTPC's racial animus and discriminatory treatment of Appellant

LaBoure in relationship to TRI's inability to perform. First, an April 5, 1986, Monthly Commentary Report prepared by TRI for Appellee HJTPC:

"We are still experiencing difficulties in (1) enrollments of qualified individuals, and (2) placements of trainees in OJT.

We could have easily filled our class in March with 55 individuals, as projected, if we had taken all of those who met basic JTPA requirements and expressed an interest in retailing positions. However, the Board of Directors is committed to a quality program and feels that maintaining our standards is **essential** to identify individuals who will qualify for retailing positions and stay on the job after completion of the course." (emphasis supplied).

Next, TRI could not perform in an April 18, 1986, letter to Appellee Hudson and was seeking to return part of its contract award through deobligation of funds:

"Because of lower-than-projected enrollments, we wish to deobligate for 30 Participants, a total of $38,040.

We have previously discussed with you the problems we have encountered in identifying qualified applicants for our program, and we are working on solutions, while maintaining the standards requested by the retailing industry."

The final letter from TRI to Appellee HJTPC, Executive Director Terry W. Hudson, dated May 15, 1986 once again manifested the nonperformance of TRI and the discriminatory practices of Appellees by extending the contract of TRI, a White subcontractor, for six months less than one month after the subcontractor stated it could not accept all its funds.

"We would like to take advantage of your offer to extend our present contract through December 31, 1986. A copy of our projection is attached. We would also like to discuss the following changes in our contract:

"1. Allow participants up to 13 hours of absences that do not have to be made up in order for TRI to receive full reimbursement for classroom instruction. Naturally, the nature of material missed

during such absences would have to be taken into account: some material would be essential to job placement and retention and would have to be made up." (emphasis supplied).

Besides TRI receiving preferential and discriminatory treatment as applied to Appellant LaBoure, Southland Corporation had its original subcontract modified with respect to upgrade wage rates for Assistant Managers which reduced the minimum hourly wage at placement from $4.65 to $4.50 per hour. Appellant's contract amendment request for entry level wage rates was denied.

Appellees cannot persuasively argue that discriminatory intent must be proven as stated in Griggs v. Duke Power, 401 U.S. 424 (1971), the Court held:

"A plaintiff need not necessarily prove intentional discrimination in order to establish that an employer has violated Section 703 of 42 U.S.C. 2000e. In certain cases, facially neutral employment practices that have significant adverse effects on protected groups have been held to violate the Act without proof that the employer adopted those practices with a discriminatory intent."

Although the fact issues of our case do not involve Section 703 of the Civil Rights Act of 1964, 42 U.S.C. 2000e, the principles of discrimination nevertheless still apply since LaBoure-Appellant, a Black subcontractor, was the only subcontractor, ever terminated by HJTPC-Appellee.

In the instant case, Appellant did not exhaust its administrative remedies under the JTPA Program or the Texas Job Training Partnership Act. The appropriate standard of review for exhaustion of administrative remedies, in this case, is whether 42 U.S.C. Sec. 1981 is an independent remedy separate from the JTPA grievance procedure, 29 U.S.C. Sec. 1554 and Texas Job Training Partnership Act, Tex. Rev. Civ. Stat. Ann. art. 4413 (52) Sec. 8 (c) (10) (H) (1984), when discrimination exists in the termination of a subcontract. See Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); and Guerra v. Manchester Terminal Corp., 498 F. 2d

641 (5th Cir. 1974), rehearing denied 503 F. 2d 567 (5th Cir. 1974).

In Pender v. National R.R. Passenger Corp., 625 F. Supp. 252 (D.D.C. 1985), the Plaintiff, a Black man, was demoted from Assistant Train Director and subsequently suspended. Rather than pursue an appeal to the National Railroad Adjustment Board (RAB), he filed a discrimination lawsuit alleging, inter alia, a violation of 42 U.S.C. Sec. 1981. On the issue of whether employees need exhaust administrative remedies under a collective bargaining agreement or federal labor law, before bringing a civil rights action (even if the collective bargaining grievance procedure provides a remedy for discrimination), the Court stated in part:

"The same principles apply to the Railway Labor Act, which does not indicate any Congressional intent to preempt or alter the remedies created by federal civil rights statutes. The Court concludes that Section 1981 provides parallel and overlapping cause of action, with its own procedures and remedies, which is not displaced by the Railway Labor Act."

Pender, supra, is directly on point as applied to the case at bar because the JTPA grievance procedure should not be the exclusive remedy for the Appellant. Although Congress established JTPA with its own set of administrative guidelines, nowhere in the JTPA Program did Congress either overtly or covertly express an intent to preempt the federal civil rights statute of 42 U.S.C. Sec. 1981. See Alexander, supra; Johnson, supra; and Guerra, supra.

Also, the administrative remedy found in the JTPA Program is similar to the grievance procedures discussed in Jones v. Niagara Frontier Transportation Authority, 524 F. Supp. 233 (D.C. N.Y. 1981), whereby a civil rights action was brought by a Minority Business Enterprise (MBE) Jones, against the contracting practices of the Niagara Frontier Transportation Authority (NFTA) on two contracts. The Court found the grievance procedure inadequate for several reasons:

"Many of these components of a wholly adequate grievance

procedure are not present in this case. The Procedures outlined in 49 C.F.R. Section 23.73 provides only a mechanism through which a grievant can file a written complaint which will trigger a unilateral investigation by the Secretary of Transportation.....If the Secretary finds failure to comply by the recipient...conciliation procedures may be initiated by the Secretary with recipient. 49 C.F.R. Section 23.73 (d), 23.81. If conciliation efforts are unsuccessful, the Secretary can take steps to terminate the recipient's federal financial assistance."

These steps are present in the Appellant's case as found in 29 U.S.C. Section 1554, 1573, 1574 and 1577 (Grievance Procedure, Monitoring, Fiscal Controls, Sanctions and Nondiscrimination). And like in the Jones case, supra, the Appellant filed a complaint with the Department of Labor in October of 1986. However, after more than the maximum allowable of 120 days, from May 8, 1987, and a five day on-site investigation by the Department of Labor from June 22 through June 26, 1987, no determination was made. Finally, on September 9, 1988, the Department of Labor (DOL) made an adverse determination against the Appellant on the issue of discrimination despite numerous relevant documents provided to DOL by the Appellant over the course of approximately two years and assurances by DOL that its final decision would be prompt and expeditious. Nevertheless, DOL awaited until three (3) days after the Appellant's Petition for Rehearing was denied by the Fifth Circuit Court of Appeals to make its final determination. The final determination of DOL did not address these issues: (a) HJTPC's misuse of government funds; (b) HJTPC's entering into subcontracts with a business in which one of its board members had a financial interest; and (c) violations of other JTPA contract procedures.

Appellant's situation in the instant case is similar again to Jones v. Niagara Frontier Transportation Authority, supra, which further stated:

"In addition, the numerous documents plaintiff submitted into evidence demonstrated that following the grievance would be a futile gesture on its part. On several occasions.....plaintiff wrote to

various officials in the UMTA and the Department of Transportation about the alleged discriminatory conduct of the NFTA.

To require plaintiff to exhaust its administrative remedies as to every contract award about which it complains...would create a nightmarish treadmill for complaining MBE, which types of entity the regulations were intended to protect.

**The plaintiff here alleges immediate threatened discrimination coupled with irreparable harm.** For this reason and for the reasons discussed above, I find that plaintiff need not further exhaust the existing administrative grievance procedures in order to pursue its request for a preliminary injunction from this Court." (emphasis supplied).

The Appellant also demonstrated that the local or State grievance procedures found in Tex. Rev. Civ. Stat. Ann. art. 4413 (52) Section 8 (c) (10) (H) were totally inadequate [See R of Appellant's February 3, 1987 Motion for Summary Judgment Against HTPC, et. al. which included the Affidavit of Robert McQueen], wherein McQueen stated:

"4. That during all times, I acted in my official capacity as Complaint Monitor to fairly and equitably handle all grievances filed with me under HJTPC procedures. It became apparent to me that the actions and conduct of the HJTPC, Terry Hudson and Jeffrey C. Londa precluded HJTPC Subcontractor, LaBoure and its President Wilmer Andrews, Jr. from receiving a fair and equitable administrative hearing from the HJTPC.

7. That Defendant Hudson personally directed and approved the termination of LaBoure's subcontract without following established procedures of the HJTPC and the City of Houston, Defendants."

As a result, the local grievance procedures of Appellee HJTPC were totally inadequate for Appellant to follow. Hence, the Appellant does seek immediate judicial relief in order to satisfy its contractual commitment based upon its 1985-1986 subcontract andto continue to be eligible for federal funds under properly administered JTPA subcontracts.

Finally, under 42 U.S.C. Section 1983, the liability of the Appellee City, as well as the Appellee Mayor, is crystalized in two recent cases: Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) and Bennett v. City of Slidell, 735 F. 2d 861 (5th Cir. 1984). These two cases set forth the standard for not only the act of acts necessary for municipal liability, but also the actual or constructive knowledge that identifies the basis for responsibility of the practices of discrimination.

The City Appellee approved by Motion of City Council, 85-2118, on July 30, 1985, the subcontract between Appellee HJTPC and Appellant. The City, as Grant Recipient, had an ongoing monitoring responsibility to review the subcontracts of Appellee HJTPC and as stated in Pembaur, supra:

"With this understanding it is plain that municipal liability may be imposed by a single decision of municipal policy makers under appropriate circumstances, no one has ever doubted that for instance a municipality may be liable under 1983 for a single decision by its properly constituted legislative body - **whether or not that body has taken similar action in the past or intends to do so in the future - because even a single decision by such a body unquestionably constitutes an act of official government policy."** (emphasis supplied).

Appellee City had a direct role in the continuation of the Appellant's subcontract as defined in Section 1.08 of that subcontract:

"That the City through its Finance and Administration Department, and the Executive Director or his designee reserve the right to conduct monitoring and evaluation of the performance rendered under this subcontract."

Likewise, Appellee City had a responsibility to HJTPC and the JTPA program according to the Houston Partnership Agreement:

"(Houston Partnership Agreement, in part....) Comply with all **federal and state regulations** and requirements; and provide for adequate monitoring, both fiscal and programmatic, and

evaluation of **all JTPA subcontractors in order to comply with JTPA.**" (emphasis supplied).

Moreover, the Houston Partnership agreement, which is executed by both Appellee Mayor and Appellee Bonfield, had a provision that provided withholding of funds from the Contractor-HJTPC if there was non-compliance:

"The City may withhold some or all payments to the contractor if the CONTRACTOR is indebted to the City **or if the CONTRACTOR engages in activities which are not in compliance with the Act or this Contract.**" (emphasis supplied).

Appellee City had both actual knowledge and constructive knowledge of Appellant's performance and termination by receiving the monthly performance reports of all JTPA and having a member of the Department Finance and Administration for the city of Houston regularly attend HJTPC-PIC Board of Directors' meetings.

Since Appellee City is accountable for key fiscal and operating policies and record maintenance as well as for monitoring of all subcontractor and Appellee HJTPC operations, Appellee City's claim that they had no knowledge of the disparate termination of Appellant is tantamount to admitting malfeasance. This is especially true in light of the fact that no other HJTPC subcontractor had ever been terminated for any reason. And as stated in Bennett, supra:

"City's **actual knowledge** of continuing practice of its employees for purpose of holding the City liable for civil rights violations may be shown by such means as discussions at Council meetings or receipt of information, while **constructive knowledge** may be attributed to governing body on grounds that it would have known of violations if it had properly exercised its responsibilities, as where violations were so persistent and widespread that they were subject of prolonged public discussions or a high degree of publicity." (emphasis supplied).

The causal connection of the Mayor appellee as stated in Hinshaw v. Dobber, 785 F. 2d 1260 (5th Cir. 1986), must be for either of the following: (1) failure to act; (2) a causal connection between the Mayor's failure to act and the wrongdoing and (3) the failure to act amounted to deliberate indifference in light of a history of widespread illegal practices.

In the case at bar, the Mayor Appellee's causal connection is found in the Houston Partnership Agreement, which manifested a failure to act:

"The Chief Elected Official fulfills the responsibilities consistent with the requirements of the JTPA, and...

**Meets regularly** with the Executive Committee of the HJTPC to review the **progress** and **implementation** of the provisions of JTPA and to seek and provide advice and counsel on **personnel, policy, and procedural matters related to JTPA.**

Is fiscally responsible for the **administration of all funds, both operational and contractual.**" (emphasis supplied).

As a result, there is a causal connection between the Mayor Appellee and the termination of the Appellant's subcontract.

## II. DID THE FEDERAL DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT COMMIT REVERSIBLE AND FUNDAMENTAL ERROR IN THEIR DISREGARD AND LACK OF EVALUATION OF STATISTICAL EVIDENCE IN DETERMINING WHETHER APPELLANT-LABOURE HAD BEEN DISCRIMINATED AGAINST UNDER THE DISPARATE IMPACT THEORY?

In Watson v. Fort Worth Bank & Trust, 108 S.Ct. 2777 (1988), _____U.S._____(1988), _____L.Ed.2d_____ (1988), the Supreme Court held, in part, under the disparate impact theory of discrimination in a 42 U.S.C. Section 2000e case, the

"Since neither the District Court nor the Court of Appeals has evaluated the statistical evidence to determine whether petitioner

made out a prima facie case of discrimination under the disparate impact theory, the case must be remanded."

The subjective decision-making of Appellee HJTPC should be evaluated under the disparate impact theory as opposed to the conventional disparate-treatment theory wherein proof of intent to discriminate is required. See Teamsters v. United States, 431 U.S. 324 (1977), McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). As stated by Justice O'Connor in Watson, supra, some facially neutral employment practices may demonstrate discriminatory intent:

"Rather, the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."

The Appellees contend that Appellant was not discriminated against but terminated for failure to perform according to the contract. However, from the inception of the legal proceedings, the Court should discern that the Federal District Court did not even give due or fair consideration to the Appellant's statistical evidence of discrimination which demonstrated that Appellant performed superior to three other "similar situated" white subcontractors. On at least two occasions at the January 22, 1987 Status Conference Hearing before the Federal District Court, (See R at Vol. 4, p. 8 and p. 37), the Honorable District Judge Ross N. Sterling either disregarded the statistical evidence or failed to consider it. For instance, when Appellant's attorney, Wayman L Prince, indicated the discrepancy among the 32 known subcontractors, the Honorable District Judge said, "Well, only thing I say to that is so what." A brief excerpt from the Record a Vol. 4, p. 8, Status Conference Hearing of January 22 1987 will illustrate the Court's indifference:

Mr. Prince: "He placed well over 100, Your Honor, in terms of his performance, which is shown here in a chart, and under the

continued service agreement which was not an amendment, he placed--if I can take just a moment to show you what he did place, Your Honor.

Under the continued service agreement, according to the plan, it was 115 that he was to have placed. It was the continued service agreement that was entered into under the termination of his original contract.

Out of that he placed 109, which is approximately 59 percent, which if that had been an amendment as opposed to a continued service agreement, he would have had the highest year-to-date placement of any of the 32 known subcontractors, according to the HJTPC performance schedule chart which was brought out during the deposition."

The Court: "Well, only thing I say to that is so what." (emphasis supplied)

Mr Prince: "The so what of it is that in this particular case one of the allegations is that the plaintiff was treated unfairly in terms of being terminated. He was the only subcontractor out of the known 32 that was terminated, Your Honor.

There were other subcontractors that did not perform at all in terms of placements, and they were never terminated. As a matter of fact, even with the contract amended for better placement rates, they were still not terminated." (emphasis supplied).

Furthermore, during the same Status Conference Hearing, See R at Vol. IV, p. 37, the Court demonstrated its disregard for statistical data when a discussion concerned the number of minority subcontractors:

The Court: "Now you say there are 32 subcontractors overall under this program."

Mr. Prince: "That's known subcontractors, Your Honor. That--there may be more. Are there more, Jeff?"

Mr. Londa: "We, have--well, it varies. Every six months we get new contracts, and I'm not sure what the number is now."

The Court: "I'm not very impressed by statistical numbers, but out of that 32 does anybody have any idea which or how many might me considered to be minorities?" (emphasis supplied).

Mr. Prince: "I do, Your Honor. I believe that number is of those-- is it three, Jeff?"

The specific basis of Appellee HJTPC, in its subjective criteria, is performance according to the contract. Since the plaintiff has already amply displayed that it did not repudiate its contract, then the critical question becomes one of performance according to Appellant's contract and HJTPC promulgated standards. Whatever the employer's practice of discrimination consists of, even if facially neutral, the disparate impact theory will not allow that practice to perpetuate the effects of discrimination as in the instance of written aptitude tests [See Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)]; rule against employing drug addicts [See New York City Transit Authority v. Beazer, 440 U.S. 568 (1979)]; and in the case of written examinations [See Connecticut v. Teal, 457 U.S. 440 (1982)].

It is a fortiori that Appellee HJTPC termination practices not manifest a significant discriminatory impact since the purpose of JTPA is the expenditure of government funds is to return an investment in human capital. As stated in 29 U.S.C. Section 1516, Performance Standards, of the JTPA:

"(a) Congressional findings
The Congress recognizes that **job training is an investment in human capital and not an expense.** In order to determine whether that investment had been productive, the Congress finds that -

(1) it is **essential** that criteria for measuring the return on this investment be developed; and

(2) the basic return on the investment is to be **measured by the increased employment and earnings of participants and the reductions in welfare dependency.**

(b) Performance criteria for adult training programs; general standards; standards relating expenditure to performance.

(1) **The basic measure of performance for adult training** under subchapter II of this chapter is the increase in employment and earnings and the reductions in welfare dependency resulting from participation in the program. In order to **determine** whether these **basic measures** are achieved, the Secretary shall prescribe standards on the basis of appropriate factors which may

include (A) **placement** in unsubsidized employment, (B) **retention** in unsubsidized employment, (C) the **increase in earnings**, including hourly wages, and (D) **reduction in the number of individuals and families receiving cash welfare payments and the amounts of such payments.**" (emphasis supplied).

As a result, Appellee HJTPC had performance measuring standards in the form of placement retention, increase in earnings and reduction in the number of individuals on welfare as stated in the JTPA. However, Appellee HJTPC, as well as the Federal District Court and the Fifth Circuit Court of Appeals, choose to ignore or disregard Appellant's performance in the following area of special targeted groups:

| " Special Targeted Groups | Percentage of LaBoure Appellant Clients | Percentage of All Appellee HJTPC Clients |
|---|---|---|
| 1. Blacks | 90% | 68.5% |
| 2. School Drop-outs | 34% | 5.0% |
| 3. Single Heads of of Household | 64% | 7% |
| 4. Welfare Recipients | 53% | 28% " |

As a performance standard was concerned, the Appellant exceeded the requirements of Appellee HJTPC but yet was terminated. When one considers that Blacks comprised 48.1% of the Houston Service Delivery Area program-eligible population, the relevancy and importance of the aforementioned statistics takes on even more significance.

The Fifth Circuit Court of Appeals in its decision, without publication of opinion, also disregarded the statistical evidence of the Appellant when it stated on p.7 of its decision (See Appendix C):

"In other words, by not offering any **fleshed-out statistical or direct evidence** to support its claim that the black

subcontractors were treated differently from whites and other groups, LaBoure has failed to establish a genuine issue of material fact that would have required the district court to take this case to trial." (emphasis supplied).

On the contrary, Appellant offered an abundance of statistical evidence and direct evidence to support its claim of discrimination through disparate impact. Besides the placements of Appellant, compared to other "similar situated" White subcontractors, and its reduction in the number of welfare recipients, the Appellant demonstrated that other Black subcontractors had been denied contract modifications on the "essential terms of their contracts" while other White Subcontractors (e.g., Southland Corporation and Training for Retailers, Inc.) had been granted performance enhancing amendments. For example, when DSU, a Black-owned company, in a May 30, 1986 letter to Appellee Hudson requested a modest contract amendment to reduce placements from 69 to 66, it was refused in June 6, 1986 reply letter from Appellee Hudson:

"The primary reason for my decision rest[s] with my reluctance to reduce placement and retention numbers which are the foundation for performance based contracts."

A January 29,1986 letter from Career Works, Inc., a Black-owned company, to Appellee HJTPC requested contract modifications pertaining to the number of training hours in order to qualify for job placement. Appellee HJTPC denied this request in January 24, 1986 reply letter.

As a result, Appellee HJTPC did have a pattern of discrimination against the three Black subcontractors in not granting either contract amendments of contract modifications. Appellees, as well as the Fifth Circuit Court of Appeals, have argued that some of the Appellant's references to discrimination and disparate impact are not grounded in record evidence. By the Federal District Court not considering the Appellant's Motion to Produce Documents and Motion to Compel Production of Documents (See R, Motion to Produce, dated February 3, 1987 and R, Motion to Compel Production, dated March 12, 1987), a

total of thirty-two (32) relevant documents could not be produced in their entirety. Through an independent action under the Texas Open Records Act, Vernon Texas Statutes Ann. (V.T.S.A.), Art. 6252-17a, the Appellant received some information pertaining to its requested documents but substantially all of the information never was produced in its entirety as requested in the Motion to Produce and Motion to Compel Production, still pending before the Federal District Court, when the judgment was entered against the Appellant.

The Appellees' have argued that the Appellant was not discriminated against by the termination but instead received a Continued Service Agreement that reduced the Appellant's average entry placement/hourly wages by twenty percent (20%) (See R. at 426, 427 and 477). In January 24, 1986 letter from Appellee Hudson to Appellant, the following terms were set forth:

"During our meeting on January 20, 1986 we agreed to the following:

A. **Average Entry Placement/hourly wage will be reduced by 20%** to
30% ( 68) $3.35 to 3.99
50% (112) $4.00 to $4.50
20% ( 45) $4.50 and above

B. You are to provide to my office no later than January 31, 1986, the exact number of participants through January 31, 1986, who have enrolled, reached 1/2 completion, reached completion, have been placed, and have been employed for thirty days.

C. Based on B above, **the remaining obligated approved funding will be reduced by 20%** and the approved current payment methodology utilized.

D. You are to submit the required placement documents for participants who have been placed, regardless of the entry wage to reflect your accurate performance." (emphasis supplied).

Also, Appellant had his subcontract amount reduced from the original amount of $572,500 to $513,278. The Continued Service Agreement was not an amendment to the original contract but only allowed the Appellant to continue operating from February 15,1986

(effective date) through June 30, 1986 to place existing participants, which had already been enrolled, at the reduced entry wage rate. The terms of the Continued Service Agreement were far less favorable to the Appellant since his original contract had been terminated and his overall contract award reduced from $572,500 to $513,278.

Since Appellee could not meet its burden of proof under the performance standards of the JTPA [See 29 U.S.C. Section 1516, Performance Standards], the Continued Service Agreement was a pretext of discrimination because the Appellant remained the only subcontractor that was terminated. As the Supreme Court stated in Watson, supra, the employer must meet its burden of proof in a disparate impact case:

"In sum, the high standards of proof in disparate impact cases are sufficient in our view to avoid giving employers incentives to modify any normal and legitimate practices by introducing quotas or preferential treatment."

Appellee HJTPC's pretext of discrimination was manifested even more when it stated that it allowed subcontractors, after four months, to change their subcontracts and this did not include the Appellant. Appellee Hudson revealed in a May 10, 1986 Full Council Meeting the following:

"Mr. Hudson also stated there was one other point from a policy standpoint that he wanted the Board to be aware of (new members), and that it was not really a change but a confirmation of what the Council had done in the past and wanted to repeat in the future as a methodology for running the SDA. He stated that last **fall after the contracts had been in place for four months,** the Council agreed to allow them to take a mid-course direction. **If they had taken too much money and couldn't perform due to the state of the economy, they could give some of the money back; if they could use more funds or wanted to adjust their planning summaries within their contracts they could do so."** (emphasis supplied).

The Appellant's subcontract was not effective until August 23, 1985 (executed August 9, 1985), and Appellant was terminated approximately four (4) months later, without benefit of an offer of "mid-course direction" or contract modification.

The disparate impact challenge to the Appellees may be unique under the Federal Job Training Partnership Act; but nevertheless, the Appellees have not met their burden of proof in rebutting the prima facie case of discrimination presented by Appellant as well as the fact that Appellees failed to follow the promulgated performance standards as delineated in 29 U.S.C. Section 1516, Performance Standards, of the J.T.P.A. Moreover, the affirmation by the Fifth Circuit Court of Appeals of the Federal District Court's decision did not give adequate consideration to the statistical evidence presented by the Appellant. Hence, there was reversible and fundamental error committed by the lower courts in this disparate impact case.

## III. DID APPELLEE-HJTPC HAVE A "LEGITIMATE BUSINESS REASON" FOR TERMINATING APPELLANT-LABOURE AND WAS THERE SUFFICIENT PROOF PRESENTED THAT INDICATED APPELLEE-HJTPC USED BUSINESS NECESSITY RATHER THAN JUST "ANY REASON" FOR THE TERMINATION OF APPELLANT-LABOURE?

The crux of the Appellees' argument in terminating Appellant LaBoure is found in two separate provisions of Appellant's subcontract, Section 1.32 and Section 1.10. Section 1.32 provides in part:

"That the **performance** of work under this SUBCONTRACT may be **terminated, in whole or** from time to time **in part,** whenever it is determined by the HJTPC that effective management cannot be maintained or quality service insured, **or for any reason,** the Executive Director shall determine that **such**

**termination is in the best interest of HJTPC."** (emphasis supplied).

And Section 1.10 provides in part:

"That **performance** as set forth in this SUBCONTRACT is **essential** to the life of this **SUBCONTRACT** ..... **SUBCONTRACTOR shall be required to justify variances** in actual levels that **exceed, plus or minus, fifteen (15) percent** of planned levels. If the cause of said variance is determined by the Executive Director to be within the control of the SUBCONTRACTOR, the Executive Director shall request that SUBCONTRACTOR produce a corrective action plan agreeable to the Executive Director. If the SUBCONTRACTOR neglects or declines to implement corrective action, the **Executive Director may at his option, terminate said SUBCONTRACT."** (emphasis supplied).

In Watson, supra, (Justice Blackmun concurring in part), not only stated that a disparate-impact focuses on the "effect" of the employment practice (as distinguished from the employer's intent) but he further stated that an employer can only rebut the plaintiff's prima facie case by asserting:

"a **legitimate, nondiscriminatory reason and produces evidence sufficient to raise a genuine issue** of fact as to whether it discriminated against the plaintiff." (emphasis supplied).

In the case at bar, Appellees allege that Appellant was terminated for failure to perform and that Appellees could terminate the subcontract for any reason. This is fallacious reasoning at best since the Appellant has already demonstrated superior performance to three "similar situated" White subcontractors over a similar period of time prior to its termination. In addition, the "best interest" of HJTPC was not served by the termination since Appellant served, particularly in the area of retail sales/cashier training, the special targeted groups better than other "similar situated" White subcontractors. Moreover, the Appellees seem to gloss over the Congressional intent of 29 U.S.C. Section 1516,

Performance Standards, which measures performance based on the four factors of: (1) placement; (2) retention; (3) increase in earnings; and (4) reduction in welfare payments. Appellant met all of these performance standards but yet was terminated. The Appellees have yet to produce one scintilla of evidence that the termination of Appellant was in the "best interest" of HJTPC according to the aforementioned Congressional intent in 29 U.S.C. Section 1516. The Appellees termination was not only a pretext of discrimination but clearly not a business necessity since other inferior performing subcontractors were not terminated, (e.g., Southland Corporation, Management Insights, Inc. and Training for Retailers, Inc.) As stated in Watson, supra, by Justice Blackmun (Justices Brennan and Marshall concurring):

"Precisely what constitutes a **business necessity** cannot be reduced, of course, to a scientific formula, for it necessarily **involves a case-specific judgment** which must take into account the nature of the particular business and job in question.....To be **justified** as a business necessity an employment **criterion must bear more than an indirect or minimal relationship** to job performance.....

And even where an employer proves that a particular selection process is sufficiently job-related, the process in question may still be determined to be **unlawful,** if the plaintiff persuades the court that **other selection processes** that have a **lesser discriminatory effect** could also suitably serve the employer's business needs." (emphasis supplied).

As indicated in Section 1.10 of the Appellant's subcontract, there is a provision for a corrective action plan in the event of a 15% performance deviation by the subcontractor. The Appellant was never presented the opportunity to submit a corrective action plan prior to his termination by Appellees. In other words, Appellees had alternatives prior to termination of Appellant's subcontract which would have had a "lesser discriminatory effect."

The proof presented by Appellees also leaves a great deal to be desired for truth and veracity. The Appellees attempted to measure, over a full program year, the performance levels of the other three "similar situated" white subcontractors against the

Appellant by using "claimed" placements rather than "actual" placements [See R at February 11, 1987 Reply of Defendants HJTPC, et.al., attached Affidavit of Appellee Hudson]. Appellees alleged these placement statistics for the 1985 program year performance:

"LaBoure 40.5% or 141/348 placements (please note that Appellant's original subcontract required only 225 placements but Appellees substituted 348 enrollments for Appellant).
Management Insights, Inc. - 75% or 237/316 "claimed" placements (please note that even without a contract amendment Management insights had an original placement requirement of 1000).
Training for Retailers, Inc. - 53% or 88/165 "claimed" placements (please note that Training for Retailers, Inc. had an original subcontract requirement of 216 placements).
Southland Corporation - 84% or 142/170 "claimed" placements (please note that Southland Corporation had an original subcontract requirement of 342 placements)." (emphasis supplied).

On the other hand, the "actual" statistics from Exhibit A of Hudson's second Affidavit [See R at February 11, 1987 Reply of Defendants HJTPC, et.al.,] and according to HJTPC Subcontractor Performance Schedule reveal these performance statistics for Program Year 1985:

"LaBoure - 61.3% or 138/255 actual placements.
Management Insights, Inc. - 8% or 78/950 actual placements.
Training for Retailers, Inc - 14% or 30/216 actual placements.
Southland Corporation - 84% or 142/170 (please note that the original subcontract required 342 placements which results in a true performance placement ratio of 142/342 or 41.5%)." (emphasis supplied).

As a result of this significant statistical disparity, HJTPC has not presented a persuasive argument that there was a "business necessity" to terminate the Appellant and that it had a "legitimate, nondiscriminatory reason" for the termination. [See Watson, supra

and Griggs, supra]. The showing by the Appellant of the disparate impact theory, as it relates to Appellees, is not meant to have any "chilling effect" on the Appellees business practice but it is designed to articulate that racial discrimination should not be allowed in the administration of the Federal Job Training Partnership Act.

Finally, the Appellees argue that the Appellant's termination claim was not timely submitted within the required sixty (60) day subcontract period after termination and that no damages should be allowed. Section 1.33 of the Appellant's subcontract provides in part:

"The SUBCONTRACTOR shall submit his termination claim to the HJTPC promptly after receipt of notice of termination, but in no event later than **sixty (60) days from the effective date thereof, unless one or more extensions in writing are granted** by HJTPC upon written request of the SUBCONTRACTOR within such sixty (60) day period of authorized extension thereof." (emphasis supplied).

Appellant submitted its termination claim for $233,173, for certain expenses incurred under the original contract, on August 29, 1986 [See R at 6 and 427] and Appellee HJTPC denied the claim based on the expiration of the sixty days. Although the Appellant's original subcontract was terminated effective February 15, 1986, Appellee Hudson unequivocally granted two extensions, in letters dated June 27, 1986 and July 8, 1986, that satisfied the normal period to file a termination claim. A part of the June 27, 1986 letter provides in part:

"Your Program Year 1985 Continued Service Agreement is **hereby extended for sixty days** to allow you to complete training and placement activities ....." (emphasis supplied).

Next, the July 8, 1986 letter provided in part:

"You were authorized a **60 day extension (through August 30, 1986)** based on our official files.." (emphasis supplied).

Moreover, it would be impossible for Appellant to submit an

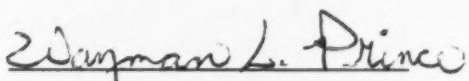
accurate and complete termination claim prior to the completion of all training, placement and administrative activities. As a result, the Appellant's termination claim was timely submitted, based on the above extensions, since the Continued Service Agreement, issued after the termination of the original subcontract, remained in effect through June, 30 1986 [See R at 427 and 477].

Thus, the Appellees have not only failed to show a business necessity in the termination of the Appellant's original subcontract, but they have also failed to show that the termination claim of the Appellant was not timely submitted.

## CONCLUSION

The constitutional and statutory issues presented in the instant case are very significant. The termination of the Appellant's subcontract by the Appellees, under the Federal Job Training Partnership Act, involves issues with precedential value based on 42 U.S.C. Section 1981 and 42 U.S.C. Section 1983. Neither the decision of the Federal District Court or the Fifth Circuit Court of Appeals correctly applied the disparate impact theory or the business necessity rule for the termination of a contract when racial discrimination is involved. For these reasons, a Writ of Certiorari should issue to review the opinion, judgment and ruling of the Fifth Circuit Court of Appeals.

Respectfully Submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Petition for Writ of Certiorari have been either served by United States mail, postage prepaid and properly addressed, or hand-delivered to all Attorneys of Record at the properly indicated address below on this 2nd day of December, 1988:

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Wayman L. Prince

Wayman L. Prince
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Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| LABOURE ASSOCIATES | § | |
| PERSONNEL SERVICES, INC. | § | |
| | § | |
| V. | § | CIVIL ACTION NO. |
| | § | H-86-3998 |
| KATHRYN J. WHITMIRE, ET AL | § | |

**FINAL JUDGMENT**

For the reasons stated in this court's Memorandum and Order entered this date, the above-styled action is hereby DISMISSED.

This is a FINAL JUDGMENT.

DONE at Houston, Texas this 3rd day of November, 1987.

ROSS N. STERLING /S/
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| LABOURE ASSOCIATES PERSONNEL SERVICES, INC. | § | |
| | § | |
| V. | § | CIVIL ACTION NO. |
| | § | H-86-3998 |
| KATHRYN J. WHITMIRE, ET AL | § | |

## MEMORANDUM AND ORDER

Now before the Court are numerous motions. It is the opinion of this court that the issues presented in this case have been sufficiently developed and argued to warrant disposition of the case in its entirety.

The court finds as a matter of law that Plaintiff LaBOURE ASSOCIATES PERSONNEL SERVICES, INC. ("LaBOURE") has failed to pursue and exhaust administrative remedies available to it for resolution of the issues presented by its complaint. The Job Training Partnership Act mandates that participants under the Act establish and maintain grievance procedures. 29 U.S.C. § 1554. The Texas Job Training Partnership Act, likewise mandates establishment of grievance procedures. Tex. Rev. Civ. Stat. Ann. art. 4413 (52) section 8(c) (10) (H), (Vernon Supp.1987). Defendant HOUSTON JOB TRAINING PARTNERSHIP COUNCIL ("HJTPC") has demonstrated, and this court finds, that HJTPC had in place such a grievance procedure. The Court further finds that LaBoure has failed to make any showing whatever that it pursued its claims according to said grievance procedure; nor has LaBoure made any showing that there existed at any time justifiable reasons for not pursuing its claim through the administrative grievance process.

Moreover, the Federal Job Training Partnership Act specifically addresses the genus of complaints asserted by LaBOURE. Had LaBOURE engaged the mechanism mandated by 29 U.S.C. § 1554, a legitimate grievance could have ultimately reached the Secretary of Labor. By reference to 29 U.S.C. § 1577 (a) (1), (2), complaints alleging discrimination will trigger mandatory action by the Secretary. See, 29 U.S.C. § 1577 (b). LaBoure has made no showing of compliance with administrative procedure prescribed in the Act.

Defendants seek dismissal of this action on the premise that Plaintiff' failure to exhaust administrative remedies acts to preclude the jurisdictional basis for this Court is inclined to agree, the language of the Act is not so clear ( See, 26 U.S.C. § 1576 (a) ) nor the doctrine of exhaustion so broad as to clearly warrant dismissal.

Although the case is brought pursuant to 42 U.S.C. § 1981, 1983, and significant tangential issues of municipal and individual liability have been briefed by the parties, the core of this case is a simple question of contract. In essence LaBOURE asserts that his subcontract with HJTPC was breached and that the manner of breach gives rise to LaBOURE's claims of racial discrimination. Upon the circumstance surrounding the alleged breach of contract LaBOURE would impute liability to the named defendants. Even though the breach of contract claim is properly plead as pendant state claim, the Court perceives it as the seminal issue upon which all other claims must rely.

Basic contract principals dictate the outcome of this case. Bare allegations of unlawful racial animus are insufficient to support a claim of discrimination when an adequate non-discriminatory reason for discharge has been established. Hornsby v. Conoco, Inc., 777 F. 2d 243, 2465 (5th Cir. 1985). The contract between HJTPC and LaBoure was terminated for reasons clearly cognizable under the law of contract and with no facial relationship to race whatsoever. Therefore, any injury of deprivation of rights of which LaBOURE has complained is without nexus to its

conclusory allegations of racially motivated animus.

In August of 1985, HJTPC and LaBOURE executed a contract. On December 19, 1985, LaBOURE sent a letter to HJTPC. Thereafter, in January of 1986, HJTPC notified LaBoure that the August contract was terminated effective February 15, 1986. Termination was clearly an express right of HJTPC under the contract. Thus, no basis for a claim of breach of contract exists against HJTPC. The August contract was effectively and legally at the end on February 15, 1986. The parties (HJTPC and LaBOURE) thereafter entered a new and separate agreement upon terms more favorable to LaBOURE.

The second leg of LaBOURE's breach of contract claim is likewise, insupportable. Plaintiff asserts breach of the August contract by HJTPC's refusal to honor LaBOURE's "termination claim." Once again, the contract is clear. Such claims must be submitted within sixty (60) days of termination. Termination unequivocally occurred February 15, 1986. The termination claim was submitted August 29, 1986. Clearly, HJTPC was under no contractual duty to honor the untimely claim.

The Court finds that the administration and termination of the August contract, and the administration of the second contract -- to the limited extent developed by the parties -- was unconformity with commercially reasonable practice and devoid of any racially motivated animus. Thus, even if there were a showing of state action, that action would not violate the constitutional or statutory rights of the Plaintiff to be free from racial discrimination.

Plaintiff's negligence claims are without merit. Any duty which might have been owed LaBOURE upon the facts presented would necessarily arise from the contracts. No contractual duties have been breached.

It is the opinion of this Court that Plaintiff LaBOURE has failed to state a claim upon which relief may be granted or to demonstrate the existence of any genuine factual issue which, if resolved in Plaintiff's favor, would result in judgment in Plaintiff's favor. It is, therefore,

ORDERED that the motions to dismiss of Defendants be and hereby are GRANTED and that this cause of action is in all things DISMISSED.

DONE at Houston, Texas, this 3rd day of November, 1987.

ROSS N. STERLING /S/
UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 87-6259

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LABOURE ASSOCIATES PERSONNEL SERVICES, INC.,

Plaintiff-Appellant,

versus

KATHRYN J. WHITMIRE, ET AL.,

Defendants-Appellees

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Appeal form the United States District Court for the
Southern District of Texas
(H-86-3998)

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( AUGUST 3, 1988 )

Before GOLDBERG, GARWOOD and JOLLY, Circuit Judges.
E. GRADY JOLLY, Circuit Judge:*

LaBoure Associates Personnel Services appeals the district court's summary judgment against its claim that the Houston Job Training Partnership Council breached its contract and discriminated against LaBoure on the basis of race. Since we find that Laboure did not sufficiently substantiate its allegations to create a genuine issue of material fact, we affirm.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I

The Houston Job Training Partnership Council ("HJTPC") is the organization responsible in Houston for implementation of the Job Training Partnership Act ("JTPA"), 29 U.S.C. § 1501-1592, and the Texas JTPA, Tex. Rev. Civ. Stat. Ann. art. 4413 (52) § 8 (c) (10) (H), under which it locates, organizes and disburses grant money to subcontractors who agree to train individuals at various skills and help them find jobs, subject to certain restrictions such as a minimum hourly wage. The HJTPC is an organization independent of the city government, but organized pursuant to a partnership agreement with the city.

LaBoure Associates Personnel Services, Inc. (Laboure) was one of the subcontractors under HJTPC, whose contract called for training and placement in the retail sales/cashier business.

LaBoure signed its original contract with the HJTPC in August 1985. The contract was to cover the the period of August 1, 1985 through June 30, 1986. LaBoure's minimum wage placement rate specified in the contract was $4.50 an hour. In December 1985, LaBoure sent a letter to the HJTPC, demanding modifications to its contract, including a lowering of the minimum wage placement rate. LaBoure stated twice in its letter that its request was "essential," strongly intimating that it would not be able to fulfill the requirements of the subcontract as it stood. The letter also stated "there would be no way that we could get youths, sixteen-years old, to go in and work in a retail store or other establishment at $4.50 an hour." After receiving this letter, HJTPC terminated LaBoure's contract. The meaning of the termination is somewhat ambiguous since HJTPC did issue a Continued Service Agreement to allow LaBoure to finish its contract term with the people it had already enrolled in the program. The Continued Service Agreement reduced LaBoure's placement performance requirements by twenty percent, and allowed for a lower minimum wage rate than the original subcontract. Its effective dates were February 15 through

June 30, 1986, the termination date of the original contract, and it apparently extended beyond that to allow for completion of placements.

On August 29, 1986, LaBoure submitted a termination claim for reimbursement of certain expenses allegedly incurred under the original subcontract to HJTPC. HJTPC reviewed and denied the claim.

II

LaBoure did not participate in any grievance procedures under the JTPA, but proceeded directly to suit once HJTPC denied its termination claim. Laboure filed its complaint in federal district court, alleging racial discrimination and wrongful termination of its contract under 42 U.S.C. § 1981 and 1983, as well as denial of equal protection and due process under the fourteenth amendment. LaBoure's complaint also included counts of breach of contract and negligence. LaBoure named as defendants the city, the mayor, HJTPC, Hudson, executive director of HJTPC, and Bonfield, chairman of HJTPC's board of directors. All of these defendants filed motions to dismiss and/or, in the alternative, for summary judgment. LaBoure filed responsive pleadings and subsequently filed several discovery motions for production of documents. Before ruling on these pleadings or motions, the district court entered a final judgment dismissing the action. The court found, as a matter of law, that Laboure had failed to pursue and exhaust administrative remedies as mandated under the JTPA, 29 U.S.C. § 1544 as well as the Texas JTPA, Tex. Rev. Cir. Stat. Ann. art. 4413 (52) § 8(c) (10) (H) (Vernon Supp. 1987). The court found that HJTPC had in place an administrative grievance procedure and that LaBoure had failed to make any showing that it had pursued its claims through that procedure nor had it presented any justifiable reason for not doing so. The district court did not decide this issue as it stated that LaBoure had not established the basis for its claims, that is, a breach of contract by HJTPC. Without such a breach, the district court held that LaBoure had no claims. The court found that LaBoure's letter in December 1985 to HJTPC was a clear

repudiation of its August contract. This justified termination of the contract by HJTPC under the terms of the contract itself.

The district court also found that LaBoure's claim that HJTPC wrongfully refused to honor its "termination claim" was equally meritless. The contract is clear that such claims must be submitted within sixty days of termination of the contract. The contract was unequivocally terminated by February 15, 1986. LaBoure did not turn in a termination claim until August 19, 1986. Thus, HJTPC was under no contractual duty to honor such an untimely claim.

The district court also found that HJTPC's termination of LaBoure's contract was in conformity with commercially reasonable practice and devoid any constitutional or statutory rights, even if there were a showing of state action.

The District court also stated that LaBoure's negligence claims were without merit since they would had to be based on a breach of contract, which did not exist.

Thus, the district court found that LaBoure had failed to state a claim upon which relief could be granted or to demonstrate the existence of any genuine factual issue. The district court dismissed the claim and LaBoure appeals.

III

There is no question that the district court was correct in its holding that HJTPC did not breach its contract with LaBoure when it terminated the LaBoure subcontract as of February 15. The subcontract contained a clause absolutely allowing HJTPC to terminate the contract at any time; it would therefore be a contradiction of the express terms of the contract to find such termination to be a breach. In addition, the contract was clear that a termination claim had to be submitted within sixty days of termination of the subcontract, and LaBoure submitted its claim long after that. Thus, there is no contradicting the district court's holding that LaBoure's breach-of-contract, e.g., its negligence claims, are meritless.

A.

LaBoure might have been able to sustain its claims based ondiscrimination, however, if it had been able to show that the HJTPC, even while treating LaBoure within the terms of the contract, still treated LaBoure differently from other subcontractors on the basis of race. It is with these claims that do not rely upon breach of contract principles but instead focus on discriminatory treatment that LaBoure had its best shot. Our examination of the record, however, reveals that LaBoure never developed a genuine issue of material fact to support its discrimination claims sufficient to ward off summary judgment. For that reason, the district court was correct in granting summary judgment against all LaBoure's claims. Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986).

LaBoure's efforts to establish its discrimination-based claims consisted of pointing to a particular harm that it had suffered, and alleging it was because of its status as a black contractor, while contending that other subcontractors escaped this harm because they were white. HJTPC points to nonracial differences between LaBoure and the other subcontractors that justified their receiving different treatment; shows that other black subcontractors were treated as the white subcontractors; and stated that, black or white, only LaBoure's subcontract was terminated. In response, LaBoure ineffectively counters by reasserting its allegations of discrimination, completely failing to ground them in record evidence. In other words, by not offering any fleshed-out statistical or direct evidence to support its claim that the black subcontractors were treated differently from whites and other groups, LaBoure has failed to establish a genuine issue of material fact that would have required the district court to take this case to trial.

Instead of the careful and methodical presentation of facts and evidence necessary to establish a statistical difference in treatment, LaBoure has offered only disjointed allegation without contextual foundations. To demonstrate our holding in this case, we will

consider a few examples; however, it would be wasteful to review each of LaBoure's unsubstantiated allegations of racial malice. Suffice it to say that we have carefully evaluated the briefs and thoroughly investigated the record and we have found that all of LaBoure's allegations suffer from the same flaws.

One illustration follows: LaBoure argues that HJTPC terminated its contract after LaBoure requested a contract modification, and that HJTPC had granted such contract modifications to sixteen white subcontractors. HJTPC counters, first, that HJTPC never granted contract modifications to other subcontractors on the specific, essential terms of the contract, that is, minimum wage and placement rates. LaBoure offers no evidence in rebuttal. Second, HJTPC states that whatever modifications it granted to other subcontractors were granted pursuant to HJTPC's own initiative in offering to all subcontractors, including LaBoure, the opportunity to modify their subcontracts because of economic difficulties in the Houston area. LaBoure refused such modifications when they were offered, stating in a letter to HJTPC that it could and would fulfill its contract obligations as written. Then. LaBoure was in a unique situation in that it was the only subcontractor that wrote independently to HJTPC disclaiming that it could fulfill its obligations. Thus, LaBoure reneged on its contract. HJTPC responded by terminating the contract and instituting a Continuing Service Agreement, incorporating many of LaBoure's "essential" requests, including lowering minimum wage and placement requirements. HJTPC therefore counters LaBoure's allegations of differential treatment by showing why LaBoure's situation, vis-a-vis the other subcontractors, was unique. LaBoure made no response to HJTPC's explanation, and so the district court was left with the understanding that LaBoure was in a unique situation and that HJTPC terminated its contract because of ~~that particular~~ and peculiar situation, not because of race. LaBoure's arguments that its performance rates were better than those of other subcontractors

who were not terminated does not overcome the fact that LaBoure alone repudiated the terms of its contract. In consequence, the district court held that because HJTPC's response to LaBoure was based upon LaBoure's unique situation and LaBoure's situation could not, therefore, be compared with the situation of the "white" subcontractors, the court could not find discriminatory intent on the part of HJTPC.

Another example of LaBoure's unanchored allegations is found in its argument that HJTPC discriminated by requiring a higher minimum wage rate in LaBoure's subcontract than it required in those subcontracts granted to "white" subcontractors. HJTPC explained that minimum wage rates relate to the amount of money paid to the subcontractor per enrollee, and that LaBoure's subcontract price for its services was correspondingly high in relation to the high minimum wage rate. In other words, more money was required and contracted for training entry-level employees to be employed at a rate of $4.50 an hour than was required and paid to other subcontractors for training entry-level employees at $4.00 an hour or less. Once again, LaBoure failed to rebut HJTPC's explanation, leaving the district with no alternative than to assume that LaBoure had ignored this factor when formulating its allegations of discrimination. This example is particularly appropriate in showing how LaBoure consistently isolates a difference between it and another subcontractor and insist that the difference is based upon racial discrimination while failing to place the difference into perspective in the light of other circumstances or contract provisions.

LaBoure's attempt to demonstrate direct evidence of racially motivated animus are equally inconclusive. HJTPC argues that the quotes contained in LaBoure's brief are often missing from the record. We need not consider this, however, since to any reasonable reader the quotations in the brief do not demonstrate racially motivated animus. LaBoure isolates moments in meetings with the HJTPC when race is mentioned, but does not explain why

these references to race are supposed to demonstrate animus rather than analysis. For example, LaBoure isolates such comments as:

"If possible, the council might need to do direct outreach to the Hispanics. Ms. Bouillion also stated that there was a direct correlation between an increase in blacks and a decrease in Hispanics. Ms. Foote [HJTPC board member] stated that upon visiting AAMA and HIU, two subcontractors representing only Hispanics were doing a good job, but were hanging on financially by a thread. She stated that the council should concentrate on helping these subcontractors."

We cannot discern what Laboure finds malevolent in such quotations. We do not review every quotation here because they all appear equally nonprobative of racial animus.

Since we have found no evidence of breach of contract or discrimination, we need not address LaBoure's other contentions regarding the constructive negligence and guilt of city officials.

B.

LaBoure also argues that the district court wrongly granted summary judgment against its lawsuit before ruling on all pending motions regarding discovery. LaBoure refers to this as a "sua sponte" dismissal and argues from that basis. As HJTPC points out, however, the dismissal was not sua sponte since the court made its decision on a motion by the defendants for dismissal or summary judgment. The district court had heard argument on these motions and had found that LaBoure had failed to support its allegations and had failed to respond to HJTPC defenses with record evidence showing breach of contract or discrimination. Thus, the district court was not required to run through the meaningless and moot exercise of ruling on discovery motion in a case in which it had correctly decided that summary judgment was warranted

## IV

LaBoure has failed to show any breach of contract by HJTPC. In addition, it did not sufficiently support its allegations of discrimination to create a genuine issue of material fact. Since all its claims require one or both of these bases, the district court properly granted summary judgment. The judgment of the district court is therefore

**A F F I R M E D.**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 87-6259

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LABOURE ASSOCIATES PERSONNEL SERVICES, INC.,

Plaintiff-Appellant,

versus

KATHRYN J. WHITMIRE, ET AL.,

Defendant-Appellees

---

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

( September 6, 1988 )

**Before** GOLDBERG, GARWOOD and JOLLY, Circuit Judges.

ENTERED FOR THE COURT:

E. Grady Jolly /S/
United States Circuit Judge